No. 92-1482

(5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ERIC J. WEISS and ERNESTO HERNANDEZ,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, ACLU OF THE NATIONAL CAPITAL AREA, AND VIETNAM VETERANS OF AMERICA, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of the National Capital Area is one of its local affiliates. In support of its principles, the ACLU and its affiliates have appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. In particular, the ACLU has long argued that military justice must conform to the requirements of due process, and that due process demands an independent judiciary.

The Vietnam Veterans of America (VVA) is a non-profit national veterans service organization chartered by Congress. Its membership is composed of over 40,000 veterans of the Vietnam era in more than 500 chapters. Vietnam-era veterans and some of VVA's members are on active duty in the armed forces. Delegates to VVA's 1985 national convention passed a resolution instructing its Legal Services Program to intervene in appropriate cases where civil liberties issues affecting active duty personnel are at issue.

STATEMENT OF THE CASE

Petitioners contend that the military justice system is constitutionally defective in that its trial and intermediate appellate judges ("Military Judges") are not protected from removal if their decisions are disliked by the Judge Advocate General. *Amici* support that position.

In this brief, *amici* address the question of whether due process requires that, in peacetime, military trial and appellate judges be appointed to their judicial offices for

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

fixed terms. *Amici* do not address the issue that arises under the appointments clause.

Courts-martial exercise jurisdiction over the entire range of common law crimes.[2] Courts-martial also exercise jurisdiction over offenses unique to the military. *See* 10 U.S.C. §§877-934 (1988). And, regardless of whether an alleged offense is "service connected," the jurisdiction of Courts-martial extends to all offenses charged against military personnel. *Solorio v. United States*, 483 U.S. 435 (1987). Upon conviction, Courts-martial may impose sentences of death or life imprisonment, 10 U.S.C. §§906a, 918, or confinement at hard labor for a term of years.[3] MANUAL FOR COURTS-MARTIAL, United States (1984), Rule For Courts-Martial 1003(b)(8).

However, unlike the judges of every state and federal court of felony jurisdiction, Military Judges are not protected against summary dismissal from their judicial duties by either tenure for a fixed term of years or tenure during good behavior. Rather, once appointed, Military Judges may be reassigned to nonjudicial duties at any time by the Judge Advocate General of their service, who has responsibility for supervising all matters concerning military justice. *See* 1 Francis A. Gilligan & Frederic I. Lederer, COURTS-MARTIAL PROCEDURE §14-031.00, at 518-19 (1991). Neither statute nor regulation protects these judges from reassignment based on dissatisfaction with their findings of fact, conclusions of law, or sentencing practices. *Id.* §14-80.00, at 555.

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[2] These include traditional common law crimes such as murder, manslaughter, rape, larceny, robbery, forgery, maiming, sodomy, arson, extortion, assault, burglary, and housebreaking. *See* 10 U.S.C. §§918-930 (1988).

[3] Six service members currently are on death row. *See United States v. Simoy*, *appeal docketed*, No. 30496 (A.C.M.R. Apr. 21, 1993); *United States v. Curtis*, 33 M.J. 101 (C.M.A 1991), *cert. denied*, 112 S.Ct. 406 (1991); *United States v. Loving*, 34 M.J. 956 (A.C.M.R.)(affirming death sentence); *petition for reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992); *United States v. Gray*, No. 8800807 (A.C.M.R. Dec. 15, 1992)(affirming death sentence); *United States v. Thomas*, 33 M.J. 644 (N.M.C.M.R. 1991); *United States v. Murphy*, 36 M.J. 1137 (A.C.M.R. 1993)(affirming death sentence).

In contrast, the judges of every state court of analogous jurisdiction are protected by either fixed terms of office or life tenure. *See* THE AMERICAN BENCH: JUDGES OF THE NATION (Marie T. Hough 6th ed. 1991-92). Every U.S. district and appellate court judge is protected by life tenure, and all comparable Article I judges enjoy fixed terms of office. In short, military courts are the only courts in the United States with felony jurisdiction whose judges are subject to summary removal.

The tenuous hold on their offices leaves Military Judges susceptible to the temptation of satisfying interests other than justice and prevents them from exercising their judicial function in the same neutral and detached environment as their colleagues do in every comparable state and federal court.

Petitioners were convicted and sentenced before military judges who served for no secure term of office.

Petitioner Weiss pleaded guilty in a bench trial to larceny of a $9.00 racquetball glove in violation of Uniform Code of Military Justice Art. 121, 10 U.S.C. §921 (1988). The Honorable E. F. Pesik, who presided over the special court-martial, sentenced Weiss to three months of confinement, forfeiture of $1395 in pay, and separation from the service with a bad conduct discharge. The Navy-Marine Corps Court of Military Review affirmed, *United States v. Weiss*, No. 89-4189 (N.M.C.M.R. Jan. 31, 1992), as did the Court of Military Appeals, 36 M.J. 224 (C.M.A. 1992).

Petitioner Hernandez pleaded guilty in a bench trial to possession, importation, and distribution of cocaine, in violation of Uniform Code of Military Justice Art. 112a,

10 U.S.C. §912a (1988). The Honorable H. K. Jowers, then a colonel in the United States Marine Corps, presided over the general court-martial and sentenced Hernandez to 25 years of confinement, forfeiture of all pay and allowances, reduction to the lowest enlisted pay grade, and separation from the service with a dishonorable discharge. The Navy-Marine Corps Court of Military Review affirmed, *United States v. Hernandez*, No. 91-1821 (N.M.C.M.R. Mar. 17, 1992), as did the Court of Military Appeals, No. 68237/MC (C.M.A. Feb. 25, 1993).

SUMMARY OF ARGUMENT

The Due Process Clause of the Fifth Amendment requires at the minimum that judges be neutral and independent in both reality and appearance. Any arrangement that positions a judge to advance personal interests through the outcome of proceedings, or that tempts a judge to make judicial decisions on bases other than the facts and the law, denies defendants in criminal proceedings due process of law.

For nearly 300 years our system of justice has embraced the principle that judges who serve at the pleasure of another government officer are not and cannot be sufficiently neutral and independent. The English legal system reached this conclusion by 1700, and its judges have been protected against summary removal from their judicial offices ever since. The American colonists declared their independence in part because, unlike English judges, colonial judges continued to serve at the pleasure of the Crown, and the majority of the newly independent states immediately granted their judges secure terms. Today, the judges of every state court of felony jurisdiction serve for at least a fixed term of years, if not for life, as do the judges of every federal court of comparable jurisdiction. The lone exception to this pattern are the judges of Courts-martial and the Courts of Military Review.

Military Judges remain an aberration in the American legal system absent a secure term of office. This unjustified arrangement is incompatible with traditional and fundamentally held notions of due process -- and particularly so in view of the truly awesome power of the military justice system to deprive an accused of life, liberty, and property. Therefore, whether the Court analyzes this arrangement under the historical analysis of *Medina v. California*, 505 U.S. __, 112 S.Ct. 2572 (1992), or the interest analysis of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), it should reverse the decisions of the Court of Military Appeals.

ARGUMENT

I. DUE PROCESS REQUIRES A FAIR PROCEEDING BEFORE A JUDGE FREE FROM BIAS, THE POSSIBILITY OF TEMPTATION, AND THE APPEARANCE OF INTEREST IN THE CASE

It is settled constitutional law that due process requires a "'neutral and detached judge in the first instance.'" *Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, __ U.S. __, 61 U.S.L.W. 4611, 4615 (June 14, 1993)(quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)); *see also Schweiker v. McClure*, 456 U.S. 188, 195 (1982). The Court has jealously guarded the requirement of neutrality, *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980), and has held that direct or indirect judicial interest in the outcome of a case, whether pecuniary or other, fails to satisfy due process requirements.

The principles that govern the requirement of judicial impartiality today were first announced by this Court in *Tumey v. Ohio*, 273 U.S. 510 (1927). There the Court held unconstitutional an arrangement in which a mayor, acting as judge, personally received court costs upon con-

viction of the defendant but not upon acquittal. The Court held that a defendant in a criminal case could not receive due process of law where the judge had such a "direct, personal, substantial, pecuniary interest" in the outcome of the case. *Id.* at 523. The Court explained that, even though some mayors would not succumb to the temptation of satisfying their own monetary interests before those of a defendant, the mere possibility was enough to invalidate the arrangement. *Id.* at 532.

Tumey's basic principle -- that due process is denied where a judge might be tempted to decide a case on the basis of factors other than the facts and the law -- is not limited to situations involving a direct relationship between a judge's income and the number of convictions. Indeed, "before one may be deprived of a protected interest, whether in a criminal or civil setting . . . one is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true . . . ." *Concrete Pipe*, 61 U.S.L.W. at 4615 (citations and internal quotation marks omitted).[4]

By the same token, in *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), the Court held that a state optometry board, whose members were all practicing optometrists, could not satisfy due process requirements in its delicensing proceedings because its members might benefit professionally from any consequent reduction in competition. In *Ward v. Village of Monroeville*, 409 U.S. at 58-60, the Court held that a mayor could not sit as judge of the Mayor's Court because assessments of fines, fees, and forfeitures contributed to village finances, which the

[4] Thus, a judge's interest in a proceeding requires disqualification if a particular outcome "substantially advances the judge's opportunity to attain some desired goal even if that goal is not actually attained in that proceeding." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 830 (1986)(Brennan, J., concurring).

mayor had an institutional interest in accumulating. And, in *In re Murchison*, 349 U.S. 133, 137-39 (1955), the Court held that a judge could not preside over contempt proceedings concerning events in grand jury proceedings over which he had also presided.

As *amici* explain below, the very same possibility of temptation and appearance of bias forbidden by *Tumey* and its progeny exists in arrangements by which judges serve at the pleasure of other government officers who may in turn have an interest in the prosecution. As the Court has recently admonished, "'justice,' indeed, 'must satisfy the appearance of justice, and this stringent rule may sometimes bar trial [even] by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Concrete Pipe*, 61 U.S.L.W. at 4615 (quoting *Marshall v. Jerrico*, 446 U.S. at 242); *Murchison*, 349 U.S. at 136; *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Aetna*, 475 U.S. at 825.

II. A SECURE TERM OF OFFICE IS THE *SINE QUA NON* OF JUDICIAL NEUTRALITY AND INDEPENDENCE AS RECOGNIZED BY AMERICAN AND ENGLISH JURISPRUDENCE

It has been a fundamental principle of Anglo-American jurisprudence for nearly 300 years that judges who serve at the pleasure of another government officer cannot perform their judicial function in a truly neutral and detached manner, and cannot, therefore, afford defendants a fair trial. The English legal system embraced this principle by Act of Parliament in 1700. American colonists declared their independence partly because colonial judges were not protected. The Framers incorporated this principle into the Constitution, and now all federal and state courts of felony jurisdiction have followed suit, with the exception of Courts-martial and the Courts of Military Review.

A. The English Lesson

English judges have been free from the threat of arbitrary or retaliatory dismissal since the early eighteenth century. In 1700, Parliament passed the Act of Settlement, which provided that judges should hold their offices *quamdiu se bene gesserit*; that is, "so long as [they] should behave well." J. H. Baker, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 145 (2d ed. 1979); *see also* 1 William Holdsworth, A HISTORY OF ENGLISH LAW 195 (7th ed. 1956). Although the Act of Settlement did not alter the fact that the judges' tenure would cease upon the death of the Sovereign, that problem was remedied by statute in 1760, and since then English judges who serve on courts of felony jurisdiction, like federal judges in the United States, effectively hold their offices during good behavior. Baker at 146; 1 Holdsworth at 195.

The protection afforded English judges was the culmination of several centuries of English legal history replete with instances of interference with the courts and of politically motivated summary dismissals of judges by both the Crown and the Parliament. Prior to 1700, all but a few judges served at pleasure, and neither the Crown nor Parliament showed restraint in exercising their prerogative for political reasons. In 1386, at the direction of Parliament, Richard II's chief judge was executed and other judges arrested and banished from the kingdom for ruling that Parliament's annulment of the king's power to govern was contrary to law. 2 Holdsworth at 560 (4th ed. 1927). In 1469, Chief Justice Markham lost his position on the King's Bench because he declined to convict an accused of treason. *Id.* at 562. One scholar notes that prior to the Act of Settlement "kings often expected subservience from their judges in matters affecting the Crown" and that during the sixteenth century "there were occasions when the judges seem to have conformed their opinions to the king's wishes." Baker at 144.

The worst abuses, however, and those that led directly to the Act of Settlement, were perpetrated in the seventeenth century, at a time when the Crown relied on the courts to resolve political and constitutional questions. Sir Edward Coke, dismissed from his position as Chief Justice in 1616 for his failure to state whether he would stay a suit if the king so ordered, heads the list of distinguished jurists removed from the bench because their loyalty to the Crown's policies had been called into doubt during the reigns of the four Stuart Kings. *See* 5 Holdsworth at 351-52 (4th ed. 1927); 6 Holdsworth at 213 (4th ed. 1927); Baker at 145.

A common form of interference by the Crown with the judiciary in this period involved seeking extra-judicial opinions. As Holdsworth notes, such consultation was legal at the time, "[b]ut when a king, who could and did dismiss judges for political reasons, constantly put these questions to them, they were obviously exposed to the constant temptation of giving the answer known to be wanted." 5 Holdsworth at 351. "[T]hey became . . . as sharp sighted as secretaries of state in the mysteries of state, and in courts of law apothegms of state were urged as elements of law." *Id.* at 352. Fully aware of the king's willingness to exercise his dismissal power, the judges were unable to fulfill their duties impartially and independently. The impact on individual liberties was catastrophic:

> Those who were arrested and imprisoned by the king or his Council could get no redress . . . [t]he law of seditious libel was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government. Privilege of Parliament was as straightly restricted by the judges as formerly it had been largely extended by the House of Commons. Punishments were proportioned rather to the

> wishes of the Crown than to the gravity of the offence. No redress could be got against the misdeeds of favorites of the king whom he chose to protect; and, a fortiori, no proceedings could be taken against servants of the Crown who had acted in obedience to the orders of the Crown.

6 Holdsworth at 214-15 (footnotes omitted). In short, "the best security which the subject had for the maintenance of his liberties was almost destroyed. The administration of the common law, upon which those liberties depended, was tainted at the source." *Id.* at 214.

But individual liberties were not the only casualties of the period, for the bench and bar suffered as well. Judges became political creatures, mere civil servants of the king, and not the "independent expositors" of the law they once had been. 5 Holdsworth at 352. Although some judges were at times able to act independently, in the eyes of the public they all inevitably became identified with the "party and policy" of the king. *Id.* "The result," writes Holdsworth, "was to bring both the judges and the law into contempt." *Id.* at 354.

In light of the English legal system's experience with judges who served at pleasure, it is not surprising that the Act of Settlement is viewed as a critical event in the development of the modern British Constitution. 10 Holdsworth at 644 (6th ed. Printing 1975). Blackstone reports that George III had been pleased to declare that "he looked upon the independence and uprightness of the judges as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the Crown." 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *268 (1765)(citing HOUSE OF COMMONS JOURNAL, March 3, 1761). Holdsworth comments that the monarch "was not only expressing the view universally held in the eighteenth century, but also

a political truth of universal application." 10 Holdsworth at 644.

B. The Colonial Experience and American Practice

While the Act of Settlement established the integrity of the English courts, none of its benefits was enjoyed by the colonies. Rather, colonial judges were appointed by the colonial governors and served at their pleasure. 11 Holdsworth at 61 (6th ed. 1938). In fact, the Crown specifically resisted attempts by local assemblies to extend the protection of tenure during good behavior to colonial judges. *Id.* at 62. The Crown's reasons can be found in pure power politics: colonial judges were dependent on local colonial assemblies for their salaries; if they were granted tenure during good behavior, the Crown would have had no effective control over its colonial judges. In short, the Crown feared an independent judicial system in the colonies. Thus, when the colonies declared independence from England, their grievances specifically included colonial judges who were subject to removal at the pleasure of the Crown: "[h]e has made judges dependent on his Will alone, for the tenure of their offices." DECLARATION OF INDEPENDENCE (July 4, 1776).

Illustratively, the Massachusetts Declaration of Rights of 1780, recognized as a summary of fundamental rights held by Americans at the end of the Revolution, states that,

> It is essential to the preservation of the rights of every individual, his life, liberty, property and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit.

MASSACHUSETTS DECLARATION OF RIGHTS Art. XXIX (1780),

reprinted in 1 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 344 (1971). Massachusetts, along with Virginia, Maryland, Delaware, New Hampshire, New York, North Carolina, and Pennsylvania all sought to ensure impartiality by providing judges with tenure during good behavior.[5] Martha A. Ziskind, "Judicial Tenure in the American Constitution: English and American Precedents," Sup.Ct.Rev. 135, 138-47 (1969). Other states, such as New Jersey and Georgia, decided that providing for a fixed term of years would guarantee sufficient judicial impartiality. *Id.*

The Framers recognized the importance of a secure term of office to judicial independence and impartiality, and they drafted the Constitution to provide that those who exercise the judicial power of the United States "shall hold their offices during good behavior." U.S. Const. Art. III, §1. As Hamilton explained in THE FEDERALIST NO. 78, "nothing can contribute so much to [the judiciary's] firmness and independence as permanency in office." Andrew Hamilton, THE FEDERALIST NO. 78 (1788).

Today, the norm of a secure term of office for federal judges extends beyond the Article III judiciary. In fact, secure terms of office are the rule among Article I courts of felony jurisdiction, and even judges of Article I courts *without* felony jurisdiction, with few exceptions, serve for fixed terms of years.[6]

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[5] *See, e.g.*, NEW HAMPSHIRE BILL OF RIGHTS Art. XXXV (1783), *reprinted in* 1 Schwartz at 379 ("It is therefore not only the best policy, but for the security of the rights of the people, that the judges of the supreme (or superior) judicial court should hold their offices so long as they behave well . . . .").

[6] The judges of the Court of Military Appeals serve 15 year terms, 10 U.S.C. §942 (1988); bankruptcy judges are appointed for 14 years, 28 U.S.C. §152(a)(1)(1988); magistrate judges serve for 8 years, 28 (continued...)

Further, the judges of every state court of felony jurisdiction and every state court of appeals serve for a fixed term of years, for life during good behavior, or until a specific retirement age. *See* THE AMERICAN BENCH, JUDGES OF THE NATION, *supra* p.3 (reviewing the terms of offices of the judges of all state courts); National Center for State Courts, Conference of State Court Administrators, STATE COURT ORGANIZATION 271-302 (1987).

Courts that have considered whether judges must hold secure terms of office have recognized and applied the long-established principle that, without a secure term of office, no judge may be considered neutral and detached. In *Winter v. Coor*, 695 P.2d 1094 (Ariz. 1985), the Arizona Supreme Court considered the case of a town magistrate who served at the pleasure of the town council. In the course of holding that such an arrangement violated the Arizona Constitution's separation of powers, the court explained the importance of judicial independence to due process concerns:

> This situation is abhorrent to the concept of fundamental fairness and so inherently likely to deprive the court of real independence as

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[6] (...continued)
U.S.C. §631(e)(1988); tax court judges serve for 15 years, 28 U.S.C. §7443(e)(1988); judges of the District of Columbia serve for 15 years, District of Columbia Code §§11-1501 and 1502 (1981); and territorial judges are all now appointed for terms of 10 years, 48 U.S.C. §1424b (Guam), §1614 (Virgin Islands), and §1694 (Northern Mariana Islands)(1988). The commissioners of federal regulatory agencies, such as the National Labor Relations Board, 29 U.S.C. §153 (1988); the Securities and Exchange Commission, 15 U.S.C. §78d (1988); and the Federal Trade Commission, 15 U.S.C. §41 (1988), all have terms of office of 5 years or more. Administrative law judges serve for indefinite terms, subject to removal after hearing and only for cause, 5 U.S.C. §§3105 and 7521 (1988). Special trial judges of the Tax Court, 28 U.S.C. §7443A (1988), and administrative judges who perform functions similar to those of administrative law judges, but do so on matters of lesser significance, serve for no fixed terms.

> to deny litigants opposing the city the impartial tribunal required as an element of due process.
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> * * *
>
> The implicit and omnipresent threat that a . . . judge can be removed immediately without cause hangs like the sword of Damocles above his bench as he rules on cases. The single hair by which it hangs is the "pleasure" of the city council whose attorney litigates before him.

Id. at 1099 (quoting *People of Thornton v. Horan*, 556 P.2d 1217, 1221)(Colo. 1976)(Carrigan, J., dissenting), *cert. denied*, 431 U.S. 966 (1977); *see also State ex rel. Morales v. City Comm'n of Helena*, 570 P.2d 887, 889 (Mont. 1977)("[t]he power to remove the police judge following a ruling adverse to the city commission is an impermissible infringement upon the duty of each and every judge to render a fair and impartial decision"); *State ex rel. Evans v. Superior Court*, 159 P. 84, 86 (Wash. 1916)(mayor's power to remove police judge at his pleasure "would violate the very principle upon which the judicial function is made to rest -- that of absolute freedom from fear or favor of the appointing power. It would not be so if a judicial officer were to be made the subject of the whim or caprice of the appointing power").

Indeed, we can find no state court decision holding that judges who preside over courts of felony jurisdiction, like Military Judges, may serve at the pleasure of another government official.[7] Decisional law indicates that

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[7] Importantly, the few decisions that have allowed judges to serve at pleasure all involved municipal courts of *severely* limited jurisdiction which bear no resemblance to courts-martial or the Courts of Military Review. *See Summers v. Thompson*, 764 S.W.2d 182 (Tenn. 1988)(city courts with jurisdiction over traffic violations or violations of city ordi-

(continued...)

courts would be justly loathe to find that judges who preside over courts with jurisdiction as extensive as that of military courts can exercise their functions impartially and independently.

Together, federal practice, state practice and decisional law explain that the hard-learned lessons of the English legal system are firmly ingrained in American jurisprudence. By definition, judges who serve at the pleasure of other government officials cannot fulfill their duties in the neutral and detached manner that affords litigants the fair tribunal, free from any "possible temptation," *Tumey*, 273 U.S. at 532, or appearance of bias, that due process of law requires.

III. PETITIONERS' DUE PROCESS CLAIM SUCCEEDS UNDER EITHER THE *MEDINA* OR THE *MATHEWS* ANALYSIS

Amici urge that petitioners' due process claim succeeds whether the Court analyzes this question under *Medina v. California*, 112 S.Ct. 2572, or under *Mathews v. Eldridge*, 424 U.S. 319.

Under *Medina*, the Court would consider whether a criminal justice system in which the trial and intermediate appellate judges serve at the pleasure of another

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[7] (...continued)
nances, and no authority to impose fines exceeding $50 or to impose extensive terms of imprisonment); *Buckalew v. Holloway*, 604 P.2d 240 (Alaska 1979)(no jurisdiction to try criminal cases); *People v. Horan*, 556 P.2d 1217 (municipal court with limited jurisdiction and trial *de novo* on appeal to court with judge serving for fixed term). The narrow jurisdiction of the tribunals at issue in these cases strongly suggests that the *Summers*, *Buckalew*, and *Horan* courts would view similar terms of office in courts of felony jurisdiction as intolerably impairing the impartiality and independence of judges. *See Summers*, 764 S.W.2d at 184 ("the holding of this case is expressly limited to those city courts that are not vested with concurrent jurisdiction with a General Sessions Court").

government officer "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." 112 S.Ct. at 2573 (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)). Petitioners should succeed under *Medina* because, as *amici* have demonstrated above, it is a settled principle of Anglo-American jurisprudence that one critical and irreducible component of a fair trial is a neutral and detached arbiter, and that judges who serve at the pleasure of another government officer cannot perform their judicial function in a truly neutral and detached manner.

Any argument that the relevant historical inquiry under *Medina* is limited to the military justice system fails to acknowledge the full scope of the *Medina* analysis. *Medina* directs inquiry not to the custom of the jurisdiction whose practice has been drawn into question, but to the traditions and conscience of "*our people*." 112 S.Ct. at 2573 (emphasis added). Accordingly, the Court's own due process analyses under *Medina* have focused on the practices of England and the colonies, and on the historical and contemporary practices of the states and the federal government. *See, e.g., Herrera v. Collins*, 506 U.S. __, 113 S.Ct. 853, 864-68 (1993); *Parke v. Raley*, 506 U.S. __, 113 S.Ct. 517 (1992). Indeed, a narrow inquiry into the customary practice of the military justice system would offer little insight into the principles of justice that the American people hold as fundamental.

Under the *Mathews* analysis, the Court would consider the interests of the defendants that are at stake in such a system, the risk of an erroneous deprivation of these interests and the probable value of additional procedural safeguards, and the interests of the government. 424 U.S. at 335. Because an accused can hardly have greater interests than those at stake in the military justice system, and because the government has not articulated any interest that warrants the current arrangement,

petitioners have satisfied the first and third of the *Mathews* inquiries. *See* Petitioners' Brief §IIA.

As to the remaining inquiry under *Mathews*, our system of justice has concluded that schemes by which judges serve at the pleasure of another government officer inherently run the risk of erroneous deprivations of life, liberty, or property, as *amici* have shown above. Importantly, the error to which such judges are prone is not merely one of mistake. Rather, the potential error is that such judges will find facts and rule on points of law with an eye towards the predilections of those at whose pleasure they serve. *See Winter v. Coor*, 695 P.2d at 1099. The current arrangement, by which Military Judges serve at the pleasure of their respective Judge Advocates General, runs this same risk of depriving military personnel of their lives, liberty, or property based on factors other than the merits of their cases.

The personal integrity of the Military Judges involved in this case is not at issue here. At issue is a system whereby even judges of the highest integrity know that their tenuous hold on their judicial positions, and thus the stability of their personal and professional lives, may ultimately depend on the Judge Advocate's pleasure with the results of their work. This personal interest is no less substantial than the interests this Court found disqualifying in *Gibson* and *Ward*. The connection between the performance of Military Judges and their own personal and professional well being is strong, palpable, and real. It is this type of "possible temptation" that this Court has found unacceptable, *see, e.g., Tumey*, 273 U.S. at 532, that creates an appearance of bias which taints the military justice system, and that runs the risk of erroneous deprivations. *See Winter v. Coor*, 695 P.2d at 1098-99; *State ex rel. Morales*, 570 P.2d at 889; *State ex rel. Evans*, 159 P. at 86. Petitioners therefore satisfy the second *Mathews* inquiry, and they should succeed under *Mathews* as well as *Medina*.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to reverse the decisions of the Court of Military Appeals.

Respectfully submitted,

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Dated: July 8, 1993